Office-Supreme Court, U.S.
FILED
JUL 8 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-986

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE NORTH HAVEN BOARD OF EDUCATION, *Petitioner,*

v.

TERREL BELL, *et al., Respondents,*

and

THE TRUMBULL BOARD OF EDUCATION, *Petitioner,*

v.

UNITED STATES DEPARTMENT OF EDUCATION AND LINDA POTZ, *Respondents,*

On A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR PETITIONERS NORTH HAVEN BOARD OF EDUCATION AND TRUMBULL BOARD OF EDUCATION

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QUESTION PRESENTED

Whether the Department of Health, Education and Welfare's (hereinafter "HEW") comprehensive employment discrimination regulations now codified at 34 C.F.R. Part 106, Subpart E, §§ 106.51-106.61 (hereinafter Subpart E) are illegal, as beyond the authority conferred by §§ 901(a) and 902 of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681(a) and 1682.[1]

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[1] The relevant functions of HEW were transferred to the Department of Education by Section 301(a)(3) of the Department of Education Organization Act, 20 U.S.C. § 3441(a). Since many of the relevant actions in this case were taken by HEW prior to the reorganization, this brief refers to that agency throughout for consistency. Thus, where appropriate, "HEW" should be deemed to include, or refer to, the Department of Education. The Subpart E regulations were originally codified at 45 C.F.R. Part 86, Subpart E, §§ 86.51-86.61.

PARTIES

The caption of the case in this Court contains the names of all parties except Robert R. Randolph, Director of Region I of the Office for Civil Rights, Department of Education, and Maria C. Montalvo, Chief of the Elementary and Secondary Education Branch of Region I, who are respondents in the North Haven case.

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OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals is reported at 629 F.2d 773. Its denial of the Petition for Rehearing is not officially reported (Cert. Pet. App. C). The opinions of the district court are not officially reported (Cert. Pet. App. D-1, D-2, E-1 & E-2). The North Haven district court decision is unofficially reported in 19 FEP Cases 1505 (D. Conn. 1979).

JURISDICTION

The judgment of the Second Circuit Court of Appeals was entered on July 24, 1980, and a Petition for Rehearing en banc was denied on October 24, 1980. On December 16, 1980, the petition for a writ of certiorari was filed with this Court, and was granted on February 23,

1981. Jurisdiction to review the judgment of the Court of Appeals is conferred on this Court by 28 U.S.C. § 1254(1). On March 18, 1981, the petitioners' time to file this brief was extended to and including May 9, 1981; on April 15, 1981, that time was further extended to and including June 25, 1981.

STATUTES AND REGULATIONS INVOLVED

This case involves the following statutes and regulations (Cert. Pet. App. A):

1. Sections 901(a) and 902 of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681(a) and 1682.

2. The regulations of the Department of Education, 34 C.F.R. Subpart E §§ 106.51-106.61.

STATEMENT OF THE CASE

Title IX of the Education Amendments of 1972 represented a legislative effort to counter sex discrimination in educational institutions. Portions of Title IX amended the existing statutes that prohibited employment discrimination to close loopholes that had worked to the detriment of employees of educational institutions. Sections 901 and 902 of that legislation were enacted to prohibit sex discrimination against the beneficiaries of federally financed programs, a prohibition lacking from the existing law protecting such beneficiaries.

Regulatory power under § 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (hereinafter "§ 901") was given to HEW under § 902 of Title IX, 20 U.S.C. § 1682 (hereinafter "§ 902"). That agency promulgated no

regulations under Title IX, §§ 901 and 902, until 1975, when what is now 34 C.F.R. Part 106, was issued in final form. The majority of those regulations concern sex discrimination against student beneficiaries of federal aid and are not at issue in this case. What is at issue is Subpart E of those regulations wherein HEW attempts to assume jurisdiction over employment discrimination by educational institutions on the basis of sex. In fact, the EEOC and the Department of Labor were given jurisdiction over sex discrimination in employment in the educational field by virtue of provisions of Title IX amending the Equal Pay Act, 29 U.S.C. § 206(d) (hereinafter the "Equal Pay Act") and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. (hereinafter "Title VII").

After these Subpart E regulations became effective, charges of sex discrimination in employment were filed with HEW against petitioners, the North Haven Board of Education (hereinafter "North Haven") and the Trumbull Board of Education (hereinafter "Trumbull"), local Connecticut school boards. HEW processed both complaints, claiming authority by virtue of Subpart E of its regulations. Both school boards pointed out that Subpart E exceeded HEW's authority and requested that HEW not proceed. North Haven also requested, in the alternative, that HEW hold its investigation in abeyance pending the decision of the Connecticut District Court in Dove v. Fritts et al., Civil Action No. N-77-501 in which the Subpart E regulations were challenged. However, HEW persisted and demanded cooperation, under threat of

administrative enforcement proceedings leading to the termination of federal financial aid, which is substantial. No HEW investigation of North Haven occurred, as North Haven promptly filed suit after being advised of HEW's refusal to hold its investigation in abeyance. Trumbull, which also receives substantial federal financial assistance, cooperated with HEW's investigation, at the end of which HEW, by letter, claimed that Trumbull had violated the Subpart E regulations and demanded that Trumbull agree, again under threat of a fund cutoff, to HEW's remedial plan for corrective action.*

*See N.H.R. Dmt. Nos. 2, 12, 13; TR.R. Dmt. Nos. 1, 2, 16 and 17 (the complaints, answer and summary judgment papers). References are to the North Haven and Trumbull Records, respectively. While the parties have moved to dispense with the joint appendix, the government is proposing to supply an appendix with its brief.

The school boards brought separate suits in the District of Connecticut,[2] seeking injunctive and declaratory relief against the further use of Subpart E by HEW. (N.H.R. Dmt. No. 2; TR.R Dmt. No. 1)

In North Haven's case, HEW filed a Motion to Dismiss, or, in the Alternative, for Summary Judgment, and North Haven cross-moved for summary judgment. On April 26, 1979, Judge Ellen Bree Burns granted North Haven's motion, declaring Subpart E to be invalid, void and of no effect whatsoever, and permanently enjoined HEW from attempting to cut off federal aid to North Haven for

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[2]Had Trumbull not brought suit at this point, administrative hearings on the merits of the purported findings would have been the next step in HEW's enforcement efforts. See 34 C.F.R. § 100.8

alleged noncompliance with the regulations. (N.H.R. Dmt. Nos. 12, 13, 16, 17)

Following Judge Burns' decision in North Haven, Trumbull, whose case had also been assigned to Judge Burns, likewise moved for summary judgment. While the government declined to file a brief, noting that the North Haven decision controlled Trumbull's case, respondent Potz, who had filed the HEW complaint against Trumbull, filed a cross-motion for summary judgment and sought discovery. Pursuant to court permission, Trumbull deferred response to the claims made in that cross motion. (TR.R. Dmt. Nos. 10, 16, 25, 26)

The district court granted Trumbull's motion for summary judgment on May 24, 1979, relying upon the North Haven decision, and, when Potz moved to open the judgment, issued a separate

opinion rejecting Potz's additional claims based on this Court's decision in Cannon v. University of Chicago, 441 U.S. 677 (1979) (Title IX permits a private right of action to a student or would-be student). The court also found no need for Trumbull to respond to Potz's factual claims and denied the cross-motion for summary judgment. (TR.R. Dmt. Nos. 21, 26)

The subsequent appeals by Potz and HEW in both cases were held inactive pending action by this Court on petitions for certiorari in three of the cases which had declared the regulations in Subpart E invalid. [Romeo Community Schools v. HEW, 600 F.2d 581 (6th Cir. 1979), cert. denied, 444 U.S. 972 (1979); Islesboro School Committee v. Califano, 593 F.2d 424 (1st Cir. 1979), cert. denied, 444 U.S. 972 (1979); and Junior

College District of St. Louis v. Califano, 597 F.2d 119 (8th Cir. 1979), cert. denied, 444 U.S. 972 (1979).] When certiorari was denied in all three cases, the cases herein were consolidated for briefing and argument, and were reactivated.

On July 24, 1980, the Court of Appeals ruled, reversing and remanding for further proceedings both judgments by the district court, and thus became the only court in the country to uphold the Subpart E regulations.

Petitioners moved for rehearing on August 7, 1980, which was denied on October 24, 1980. On February 23, 1981, North Haven's and Trumbull's joint petition for a writ of certiorari was granted by this Court.

Meanwhile, the two claimants whose charges triggered this litigation have continued to pursue a barrage of other remedies in addition to their Title IX administrative claims. Elaine Dove, who filed the HEW complaint against North Haven, also filed charges with the Equal Employment Opportunity Commission (EEOC Charge No. 011780551), and filed a federal court suit alleging violations of Title VII and 42 U.S.C. § 1983, as well as Title IX violations.

Linda Potz, who filed the HEW complaint against Trumbull, also availed herself of other forums by filing an EEOC complaint (EEOC Charge No. 011791590), an appeal to the Connecticut Freedom of Information Commission (#F.I.C.-77-156), an appeal to the Connecticut Court of Common Pleas (D.N.

1183125, Fairfield County at Bridgeport), a Connecticut State Labor Board unfair labor practice charge (T.P.P. 3963), and a civil action in the United States District Court in Connecticut, Civil Action No. B-81-210, as well as seeking relief through contractual grievance procedures. She has also sued Shirley Blumin, Director of Pupil Services in Trumbull, in Superior Court (D.N. 165640, Superior Court, Fairfield County at Bridgeport) for five hundred thousand dollars ($500,000) damages for allegedly falsely stating that Potz was incompetent.

SUMMARY OF ARGUMENT

The Subpart E regulations promulgated by HEW under Title IX of the Education Amendments of 1972 purport to

regulate sex discrimination in employment. To date, there have been seventeen (17) decisions declaring Subpart E to be illegal.[3] Only the Second Circuit Court of Appeals, in its decision below, has held otherwise.

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[3] Romeo Community Schools v. HEW, 438 F. Supp. 1021 (E.D. Mich. 1977) ("Romeo I"), aff'd, 600 F.2d 581 (6th Cir. 1979) ("Romeo II"), cert. denied, 444 U.S. 972 (1979); Brunswick School Board v. Califano, 449 F. Supp. 866 (D. Me. 1978) ("Islesboro I"), aff'd sub nom. Islesboro School Committee v. Califano, 593 F.2d 424 (1st Cir.) ("Islesboro II"), cert. denied, 444 U.S. 972 (1979); Dougherty County School System v. Califano, 19 FEP Cases 688 (M.D. Ga. 1978) ("Dougherty I"), [aff'd sub nom. Dougherty County School System v. Harris, 662 F.2d 735 (5th Cir. 1980), cert. pending, No. 80-1023]; Junior College District of St. Louis v. Califano, 455 F. Supp. 1212 (E.D. Mo. 1978) ("Junior College I"), aff'd, 597 F.2d 119 (8th Cir. 1979) ("Junior College II"), cert. denied, 444 U.S. 972 (1979); Seattle University v. HEW, 16 FEP Cases 719 (W.D. Wash. 1978) ("Seattle I"), aff'd, 621 F.2d 992 (9th Cir.) ("Seattle II"), cert. granted, 101 S. Ct. 563 (1980); Auburn School District v. HEW,

footnote 3 continued

19 FEP Cases 1504 (D.N.H. 1979); Board of Education of Bowling Green City School District v. HEW, 19 FEP Cases 457 (N.D. Ohio 1979) ("Bowling Green"); North Haven Board of Education v. Califano, 19 FEP Cases 1505 (D. Conn. 1979), rev'd sub nom. North Haven Board of Education v. Hufstedler, 629 F.2d 773 (2d Cir. 1980), cert. granted sub nom. North Haven Board of Education v. Bell, 101 S. Ct. 1345 (1981) ("North Haven"); Trumbull Board of Education v. HEW, No. B-78-401 (D. Conn. May 31 and Sept. 13, 1979), rev'd, 629 F.2d 773 (2d Cir. 1980), cert. granted, 101 S. Ct. 1345 (1981) ("Trumbull"); University of Toledo v. HEW, 464 F. Supp. 693 (N.D. Ohio 1979) ("Toledo"); Grove City College v. Harris, 500 F. Supp. 253 (W.D. Pa.) ("Grove City College"), appeal pending, Nos. 80-2383, 80-2384 (3d Cir. 1980); In the Matter of Hillsdale College and State of Michigan, Docket No. A-7 (HEW Administration Proceeding, August 23, 1978), Petition for Review of Order filed, No. 80-3207 (6th Cir. 1980) ("Hillsdale"). In addition, just after the Second Circuit rendered its opinion in this matter, the Fifth Circuit issued an opinion declaring Subpart E to be illegal. Dougherty County School System v. Harris, 622 F.2d 735 (5th Cir. 1980), [cert. pending No. 80-1023] ("Dougherty II"). See also Leake v. University of Cincinnati, 605 F.2d 255 (6th Cir. 1979); Kneeland v. Bloom Township High School District, 484 F. Supp. 1280 (N.D.

These regulations are invalid because: (1) Sections 901 and 902 of Title IX, upon which these regulations are predicated, are directed at beneficiaries of federally financed education programs, not employees, and (2) the Subpart E regulations are not limited to the particular programs or part thereof receiving federal aid as § 902 of Title IX mandates.

The key language of § 901 under which HEW claims authority to regulate employment discrimination parallels directly § 601 of Title VI of the Civil

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footnote 3 continued

Ill. 1980); Hoth v. Grinnell College, 23 FEP Cases 528 (S.D. Iowa 1980); Sobel v. Yeshiva University, 477 F. Supp. 1161 (S.D.N.Y. 1979), as to the absence of a private right of action for employment discrimination.

Rights Act of 1964, 42 U.S.C. §§ 2000d et seq. (hereinafter "Title VI" or "§ 601"). The legislative history of that Title VI language indicates that when § 601 was being considered by Congress, Attorney General Kennedy, the Justice Department, Senator Humphrey (the Senate floor leader), Congressman Celler (the House floor leader) and others made clear that such language was not intended to cover employment discrimination. Rather, employment discrimination was to be covered by Title VII, as well as by the Equal Pay Act.

Following this model, the Title IX Education Amendments of 1972 dealt with sex discrimination against beneficiaries of federal aid by adopting in § 901 language substantially identical to

§ 601. Title IX addressed employment discrimination by amending Title VII and the Equal Pay Act to close loopholes which prevented their application to employment discrimination by educational institutions against their various employees. To accomplish this, it was necessary to eliminate proposed language providing that nothing in Title IX covered employment, language which would have been inconsistent with the amendments to Title VII and the Equal Pay Act.

Congress proceeded to engraft upon the language of § 601 of Title VI exceptions and qualifications directed at students, not employees. Reflecting the understanding that the language used in § 901 did not cover employment, the Justice Department proposed language for Title IX which would have expressly

included employment discrimination under the coverage of § 901. This was not adopted. Instead, witnesses testifying at the House hearings seemed content with the proposal to address sex discrimination in employment by amending Title VII and the Equal Pay Act. In addition, other legislative history, including floor remarks of Sen. Bayh, supports the proposition that § 901 is intended to cover beneficiaries of federal funds, rather than employees, that Title IX is just like Title VI and that employment is covered by the amendments to Title VII and the Equal Pay Act.

Whether § 901 might in some cases permit HEW to deal with sex discrimination in employment in those narrow circumstances where there is a pattern of sex discrimination against teachers or other employees of educational

institutions which somehow might result in sex discrimination against students, or in cases where the employees are the intended beneficiaries of federal aid, is not at issue in this case. No such showing is required by Subpart E. Rather, Subpart E is directed at employment per se and hence is invalid.

Further, Subpart E is not "program specific," and thus conflicts with the limited mandate of the provisions of §§ 901 and 902. Section 901 is expressly limited by its terms to discrimination in an "education program or activity receiving Federal financial assistance" and § 902 limits the scope of § 901 of Title IX to the "particular program or part thereof," while requiring that the regulations under Title IX be directed to federally funded "program[s] or activit[ies]." The Subpart E regulations

conflict with these provisions because they are not limited to those programs and activities funded by federal money, but purport to cover all programs of an institution receiving federal funds.

Upholding the decision of the district court does not mean that victims of sex discrimination in employment by educational institutions will be without a remedy. Title VII, the Equal Pay Act and the Civil Rights Statute, 42 U.S.C. § 1983, provide adequate forums for such claims to be heard. Intended beneficiaries of federally funded programs should not be penalized when other perfectly adequate remedies specifically directed to problems of employment discrimination exist.

Therefore, this Court should reverse the judgment of the Second

Circuit and reinstate the summary judgments granted by the district court.

ARGUMENT

SUBPART E OF THE TITLE IX REGULATIONS IS ILLEGAL

Preliminary Statement

These actions challenge the validity of Subpart E of HEW's regulations under Title IX of the Education Amendments of 1972. This challenge to the regulations was made because North Haven and Trumbull were threatened with termination of federal financial aid by HEW, in response to charges of sex discrimination filed by individuals. These actions do not address the merits of the claims of sex discrimination,[4] but rather

[4] HEW and Potz cannot prove their charges of sex discrimination by winning this

call for this Court to determine the legal question of the validity of these regulations.

I. THE SUBPART E REGULATIONS ARE INVALID BECAUSE HEW'S AUTHORITY UNDER TITLE IX, AS SET OUT IN §§ 901 AND 902, IS LIMITED TO DISCRIMINATION AGAINST BENEFICIARIES OF FEDERAL FINANCIAL ASSISTANCE AND DOES NOT ENCOMPASS DISCRIMINATION AGAINST EMPLOYEES PER SE.

A. Title IX Of The Education Amendments Of 1972, Like The Civil Rights Act Of 1964, Treats Discrimination Against Beneficiaries Of Federal Funds Separately From Employment Discrimination.

Title IX of the Education Amendments of 1972 was a multi-part

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footnote 4 continued

case, any more than Trumbull and North Haven can exonerate themselves by obtaining a ruling that HEW's regulations are illegal. These lawsuits raise solely the issue of the validity of Subpart E. See Romeo I, supra, 438 F. Supp. at 1028, which explains that facts are irrelevant in a suit such as this which challenges the legality of the regulations.

legislative package designed to combat sex discrimination in educational institutions on a number of fronts.

Prior to the passage of Title IX, there were three major loopholes in the statutory coverage of discrimination which, in net effect, permitted educational institutions to discriminate against students and employees on the basis of sex.

The first loophole was in Title VI, which prohibited discrimination based on race and color against beneficiaries of federal aid, such as students, but made no mention of sex. The second loophole was in Title VII, which prohibited sex discrimination in employment, but did not cover the employees of a state or political subdivision thereof or employees who "perform work connected with the educational activities" of schools.

Finally, the Equal Pay Act, which prohibited sex discrimination in wages, exempted administrative, executive and professional workers from its coverage.

Title IX was designed, inter alia, to close all three loopholes by amending, in §§ 906 and 908, Title VII and the Equal Pay Act, to remove the exemptions in those statutes, and by adopting as § 901 of Title IX, a provision similar to § 601 of Title VI, to cover sex discrimination against beneficiaries.[5]

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[5]The amendments to Title VII that were passed as part of Title IX were not included in the final codification of Title IX because the same amendments had already been passed as part of the 1972 amendments to the Civil Rights Act of 1964, P.L. 92-261 (see Romeo I, supra, 438 F. Supp. at 1030, n.12). However, Congress never actually voted to delete the Title VII amendments. Rather, those amendments passed both houses and were included in the Conference Committee Report No. 798, reprinted in [1972] U.S.

Thus, Title IX prohibited sex discrimination by educational institutions by directly following the pattern of existing law, i.e., with HEW having jurisdiction over discrimination against beneficiaries of federal funds, as under Title VI, and the Equal Employment Opportunity Commission (hereinafter the "EEOC") and the Department of Labor having jurisdiction over employment discrimination on the basis of sex, pursuant to Title VII and the Equal Pay Act.[6]

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footnote 5 continued

Code Cong. & Ad. News, 2608, 2672 (subpart h). Because Title VII had already been amended in the same manner as § 908 proposed to do, that section was dropped from the final codification.

[6]Jurisdiction over the Equal Pay Act was transferred from the Department of Labor to the EEOC under President Carter's Reorganization Plan No. 1 of 1978, § 1, 43 Fed. Reg. 19,807 (1978), 92 Stat. 3781.

1. The language of § 901 of Title IX is directed at beneficiaries, not employees.

   a. Section 901 of Title IX incorporates almost verbatim the language of § 601 of Title VI.

Discrimination against beneficiaries of federal funds is covered by § 901 of Title IX of the Education Amendments of 1972. This section uses language taken almost verbatim from § 601, except that the word "sex" in § 901 of Title IX replaced "race, color or national origin" in § 601 of Title VI and the word "education" limits the phrase "program or activity."[7] See Cannon, supra, 441 U.S. at 694, 695.

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[7]Section 901 provides that:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or

In fact, it was originally proposed that there should be an amendment to Title VI "that would simply have added the word 'sex' to the list of discriminations prohibited by § 601 of Title VI." Cannon, supra, 441 U.S. at 695, n.16.

However, as Representative O'Hara explained, he, as Floor Manager, opted for a new law, separate from Title VI, but adopting its language, in order

footnote 7 continued

> be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that . . .

Section 601 provides that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

to prevent attempts to gut Title VI by amendments from the floor:

> [I] was very nervous about this effort to amend title VI because it opened up, it made all of title VI open to amendment when we hit the floor with the bill.
>
> If you fiddled around with amending title VI, then you had a problem when you got to the floor with people who would jump up with other amendments to title VI having nothing to do with sex discrimination, and title VI would wind up being gutted on the floor.
>
> So I insisted instead of amending title VI that we write and put into the bill a new title that was equivalent to title VI in terms of discrimination on the basis of sex, but it would not then, in a parliamentarian sense, open

> up title VI to amendments on the floor. . . . It was a cut and paste job. There was a Xerox of [Title VI of] the Civil Rights Act that [the staff] just pasted in. (emphasis added)

Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the Comm. on Education and Labor, House of Representatives -- Review of Regulations to Implement Title IX, 94th Cong., 1st Sess. (1975) (hereinafter "Review Hearings"), at 409.

Additional support for the congressional intent to model § 901 of Title IX after § 601 of Title VI is found in the various statements from the legislative history cited by this Court in Cannon, including the statement of Senator Bayh that "[t]his is identical language, specifically taken from title VI

of the 1964 Civil Rights Act" and his other statement that "[w]e are only adding the 3-letter word 'sex' to existing law." Cannon, supra, 441 U.S. at 694, n.16.

It is not surprising then, that, as this Court noted, "[t]he drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been . . . ." Cannon, supra, 441 U.S. at 696 and see citations at 696, n.19.

This is especially so here. As this Court stated:

> It is always appropriate to assume that our elected representatives, like other citizens, know the law; in this case, because of their repeated references to Title VI and its modes of enforcement, we

> are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI and that that interpretation reflects their intent with respect to Title IX.

Id. at 696-698.

Thus, a determination of the intent of Congress in passing § 901 of Title IX should start with an examination of Title VI and its genesis.

b. The legislative history and judicial authority clearly demonstrate that employment discrimination is not within the parameters of § 601.

As originally introduced, Title VI of the 1964 Civil Rights Act included a prohibition of employment discrimination. H.R. 7152, 88th Cong., 1st Sess. (1964).

However, a later draft removed employment discrimination from Title VI, and instead revised and expanded Title VII which covered employment discrimination.

When congressional action on the revised version of § 601 began, § 601 was substantially in its present form, which, as noted earlier, was the basis of § 901 of Title IX.

In the course of congressional consideration of this revised version of § 601, it was repeatedly emphasized that the revised § 601 did not cover employment discrimination. See, e.g., the statement of Senator Ervin: "[t]his change takes out the provisions of the old title VI dealing with what I call

FEPC [Fair Employment Practice Commission], . . ." Civil Rights - The President's Program, 1963: Hearings on S. 1731 and S. 1750 Before the Senate Comm. on the Judiciary, 88th Cong., 1st Sess. (1963), at 335.

Reflecting this, it was generally agreed that a violation of Title VII, i.e., discrimination in employment, would have no "bearing on payments covered by title VI." 110 Cong. Rec. 1602 (1964) (statement of Congressman Mathias).

This is spelled out in a 1964 memorandum the Justice Department prepared for members of Congress during the debate on the 1964 Civil Rights Act, which specified that it was Title VII, not the new Title VI, which prohibited employment discrimination.

Q. What is the relation, if any, between Title VI and Title VII?

A. There is no intended interaction between these titles. Title VI deals with discrimination in connection with federal financial assistance. Title VII prohibits discrimination in employment . . .

Q. Would the fact that an employer is found to have discriminated in jobs under Title VII warrant the cutting off of any federal financial assistance he is receiving under Title VI?

A. No. . . . The mere fact that an aid recipient violated Title VII would not itself warrant the termination of aid. Moreover, the agency administering the aid would not adopt a nondiscrimination in employment provision in connection with

> its aid program unless assistance to employment was one of the purposes of the program.

See "Memorandum, Proposed Civil Rights Act of 1964--H.R. 7152" Feb. 1964, at 47, cited in Kuhn, "Title IX: Employment and Athletics Are Outside HEW's Jurisdiction," 65 Geo. L.J. 49 at 52-53 (1976).

As Attorney General Kennedy explained, "Title VI is limited in application to instances of discrimination against beneficiaries of Federal assistance programs, as the language of § 601 clearly indicates." (emphasis added) 110 Cong. Rec. 10076 (1964).

Similarly, Congressman Celler, Chairman of the House Rules Committee and House Floor Manager for the bill, specifically agreed that Title VI "applies only to the policy of the management

of the school as far as students are concerned" and that discrimination against an applicant for employment in connection with a federally assisted program "has nothing to do with title 6. That would come under FEPC." Civil Rights: Hearings on H.R. 7152 Before the House Comm. on Rules, 88th Cong., 2d Sess. at 198 (1964).

Despite these clear indications that Title VII, and not Title VI, covered employment, some members of Congress wanted the statute to clarify the intended scope of § 601. As such, § 604, which explicitly stated the intended scope of § 601, was added to Title VI. See Romeo I, supra, 438 F. Supp. at 1031, n.14. Section 604, 42 U.S.C. § 2000d-3, provides that "[n]othing contained in

this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment."

However, as the above-quoted comments of the Justice Department and legislative leaders so plainly show, the intent of § 604 was not to diminish the scope of what would otherwise have been covered. To the contrary, in the words of Senator Humphrey, the Senate floor leader, "we have expressed in specific legislative language what has always been intended.", 110 Cong. Rec. 12707 (1964), and, similarly, "[w]e have made no change

in substance in title VI . . . . We have modified the language to make explicit the declared intention of this title." 110 Cong. Rec. 12715 (1964).

Supporting this is the decision in United States v. Jefferson County Board of Education, 372 F.2d 836, 882-883 (5th Cir. 1966), aff'd en banc, 380 F.2d 385, cert. denied, 389 U.S. 840 (1967), which quotes the statements of Senator Humphrey and Attorney General Kennedy, and notes that in enacting Title VI, "Congress did not, of course, intend to provide a forum for the relief of individual teachers who might be discriminatorily discharged . . ." and that under § 601, "it is the school children, not the teachers (employees), who are the primary beneficiaries of federal

assistance to public schools."[8] 372 F.2d at 882-883.

The legislative history thus shows that even before § 604 was added to Title VI, Attorney General Robert Kennedy, floor leaders Hubert Humphrey and Emanuel Celler, and others, agreed that the language of § 601 was clear; it was not intended to cover employment per se. The courts recognized this and construed Title VI accordingly.[9]

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[8] In Jefferson County, the court also held that since § 601 of Title VI was designed to protect students, where faculty desegregation was necessary to a proper student desegregation plan, it was a proper subject of jurisdiction under § 601. See Point I(B) infra.

[9] In fact, even the Second Circuit has construed Title VI as not covering employment except with respect to "federal funds aimed primarily at providing employment." Association Against Discrimination in Employment, Inc. v. City of Bridgeport, 25 FEP Cases 1013, 1028 (2d Cir. 1981).

c. The view that the language of §§ 601 and 901 does not cover employment reflects the plain meaning of such language.

Consistent with the views expressed by the Attorney General and the floor leaders concerning the meaning of the language used in § 601 (and later § 901), every court which faced the issue of the scope of § 901 prior to the Second Circuit found that the language of § 901(a) does not include employees per se within its terms. This reflects the fact that the language of § 901(a), 20 U.S.C. § 1681(a),

> on its face, is aimed at the beneficiaries of the federal monies, i.e., either students attending institutions receiving federal funds or teachers engaged in special research

> being funded by the United States government. The section does not include employees within its terms.

Islesboro II, supra, 593 F.2d at 426 (emphasis added). Accord, e.g., Junior College II, supra, 597 F.2d at 121 ("The First Circuit accurately noted that the plain language of section 1681(a) does not include employment discrimination . . ."); Romeo II, supra, 600 F.2d at 584 ("We find HEW's construction of Title IX [to cover employment] to be strained").

In addition, this same Title VI language, as incorporated in § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 has led the courts to conclude that employment per se was not covered in § 504. United States v. Cabrini Medical Center, 639 F.2d 908 (2d Cir.

1981); Simpson v. Reynolds Metals Company, Inc., 629 F.2d 1226 (7th Cir. 1980); Carmi v. Metropolitan St. Louis Sewer District, 620 F.2d 672 (8th Cir.), cert. denied, 101 S. Ct. 249 (1980); Trageser v. Libbie Rehabilitation, Inc., 590 F.2d 87 (4th Cir. 1978); Brinkley v. Department of Public Safety, 22 FEP Cases 164 (N.D. Ga. 1980); Silverstein v. Sisters of Charity, 38 Colo. App. 286, 559 P.2d 716 (1976); Zorick v. Tynes, 372 So.2d 133 (Fla. App. 1979); but see, Hart v. County of Alameda, 485 F. Supp. 66 (N.D. Cal. 1979).

Indeed it is ironic that the Second Circuit found employment covered under § 901 of Title IX, but not covered under § 504 of the Vocational Rehabilitation Act of 1973, 29 U.S.C. § 794 (hereinafter "§ 504") which incorporates Title VI by reference, since, as the court

suggested in Simpson v. Reynolds Metals Company, Inc., supra, 629 F.2d at 1236, n.18, it would appear that the non-coverage of employment is even clearer under Title IX because:

> § 901 applies to "education program[s] or activit[ies] receiving Federal financial assistance," and the majority of the exceptions to § 901 specifically refer to activities relating to students. At the time it was adopted, Congress also removed the exemption for educational institutions from Title VII, see Act of March 24, 1972, Pub. L. 92-261, § 3, 86 Stat. 103 (1972), and other related statutes intended to remedy private employment discrimination.

629 F.2d at 1236, n.18. (emphasis in original).

While employment was not intended to be covered under § 901, it was nevertheless necessary that the language be broad, in view of the wide variety of beneficiaries and the many forms which sex discrimination might take. As the court stated in Romeo I, supra, 438 F. Supp. at 1032:

> The beneficiaries of Romeo's Title I remedial reading programs are the schoolchildren in those programs. The participants in Romeo's vocational education programs are the students learning new vocations through them. The beneficiaries of Romeo's School Lunch program are the disadvantaged children who receive free milk as a result of this federal assistance. Section 1681 was written in broad terms not to cover all forms of sex discrimination in

> education, but only to cover the wide variety of education programs funded by the federal government and the many ways in which sex discrimination against students in those programs can be manifested. (emphasis added)

As passed, the language of § 901 is inappropriate when applied to teachers, school secretaries, or cafeteria workers:

> Teachers participate in these programs only to the extent that they may teach and help administer some of them; teachers benefit from these programs only to the extent that the funds for them may be used to pay their salaries; teachers are "subjected to discrimination under" these programs, (emphasis added), only to the extent that the programs themselves

> may be established and operated in an employment-related discriminatory way. Teachers, in short, are hard pressed to fit themselves within the plain meaning of § 1681's prohibitory language, general as it may appear on its face. When Congress means to statutorily regulate employment discrimination, it uniformly does so in more explicit terms than this.

Romeo I, supra at 1031-32.

Hence this language must be read as covering the wide range of beneficiaries of federally funded programs, and not employees.

d. The exemptions and qualifications of § 901 are directed at students, not teachers.

Section 901 engrafts upon the language of § 601 a long series of exemptions and qualifications all of which

relate to sex discrimination with respect to students and none of which relates to teachers, custodians, secretaries and other board employees. This confirms that § 901 is directed at students, not teachers.

For example, exemptions 1, 2 and 5 address the admissions policies of educational institutions. Exemptions 3 and 4 entirely exempt religious and military institutions, and exemptions 6, 7, 8 and 9 exempt student activities such as fraternities or sororities, boy and girl conferences, beauty pageants and father-son or mother-daughter activities. Thus, Congress has very closely addressed the student relationship with educational institutions, setting narrow parameters around what was covered by § 901. At the same time, none of the exemptions

addresses the relationship of employees of educational institutions.

It strains credibility that Congress would so narrowly define the student relationship while leaving the employment relationship wide open. A similar problem arises if the exemptions of § 901 apply to employment. It is difficult to believe, for example, that Congress intended to exempt employment in the context of military academies to allow such an institution to discriminate against females in secretarial or cafeteria positions.

When Congress has addressed the employment relationship, it has included appropriate exceptions. See, for example, the bona fide occupational qualification exemption to Title VII, 42 U.S.C. § 2000e-2 and the exemption

for employment of aliens in 42 U.S.C. § 2000e-1.

HEW argues that the absence of any mention of employment in the § 901 exclusions signifies an intent to cover employment under that section without exceptions.[10] The Senate version of Title IX did contain an exception for employment which related to the proposed amendments to Title VII--but not § 901--for "employment of individuals of a particular religion to perform work connected with the carrying on by such institution of its religious activities." Conference Report No. 798, [1972] U.S. Code Cong. & Ad. News 2608 at 2672.

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[10] In reality even HEW recognized that it made no sense to permit no exceptions in the area of employment, and so, in proceeding with Subpart E, HEW simply added a BFOQ exemption by regulation. 45 C.F.R. § 86.61, 34 C.F.R. § 106.61.

This is further evidence that § 901 and its exceptions are directed at students--not employees.

Thus, as the Sixth Circuit expressed it in Romeo II, supra, 600 F.2d at 584:

> An examination of these provisions [the exceptions in § 901] discloses that each exception relates to students, student bodies, or participants in programs. They are not concerned with teachers or staff. It may be fairly assumed that the exceptions relate to students because students are the subject of § 1681; that is, the exceptions deal with the same subject matter as that covered generally by the preceding language.

Islesboro I, supra, 449 F. Supp. at 870; Romeo I, supra, 438 F. Supp. at 1031-32.

Similarly, after the exceptions in Subsection (a), there appears a Subsection (b) of § 901 which qualifies the scope of § 901, but which, like the exceptions listed in Subsection (a), is directed at students. Specifically, Subsection (b) provides that nothing contained in Subsection (a) shall require

> preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity . . .

Again, this language is clearly directed at students, not employees.

Thus, the exemptions and qualifications of § 901 are not directed to employment and in this way indicate

that § 901 itself is not directed to employment.

2. The deletion of "§ 904" was necessary to avoid inconsistency and had no effect on the established meaning of § 901.

As originally passed by the House, Title IX did include "§ 904," paralleling the clarification language of § 604, restating that § 901 did not authorize agency action in the area of employment discrimination.

However, there were specific provisions in Title IX which addressed the employment relationship (i.e., the amendment to Title VII and the Equal Pay Act) as was not the case with the revised Title VI. The inclusion of § 904 would have been inconsistent with those provisions. Hence, § 904 was deleted in the House-Senate Conference Committee.

(See Romeo II, supra, 600 F.2d at 584; Islesboro II, supra, 593 F.2d at 428).

This explanation for the deletion of § 904 has been recognized by all courts which have addressed the issue except the court below. See, e.g., Islesboro II, which stated: "The above-cited section [904] would have been inconsistent with other sections of the Act then being enacted, namely the amendments to Title VII and the Equal Pay Act . . . ." 593 F.2d at 428.

That this deletion of § 904 was made to remedy a drafting mistake is further clarified by the comments of Representative O'Hara during the hearings on the Title IX regulations when he stated:

> The staff was given overnight to draft this whole thing [Title IX] and they goofed, 904 got in there by mistake. It

> was a cut and paste job. There was a Xerox of [Title VI] the Civil Rights Act [of 1964] that they just pasted in.
>
> Then when we got around to straightening things out in conference we improved the drafting and dropped it out.
>
> Now, great significance is being given to the fact that it was dropped out. It was dropped out because it got in through a drafting error. So the quiet, easy way to get it out was to slide it out somewhere along the line without having to go through a long explanation of how it got in. So much for that part of the argument. (emphasis added)

Review Hearings, supra, at 409.

Since the court below was heavily influenced by its inability to find "language anywhere in the legislative

history that even suggests that the conference committee deleted the provision merely for the sake of consistency," North Haven, supra, 629 F.2d at 783, this statement from Chairman O'Hara drastically undermines that decision[11] and points inescapably to the fact that § 904 was dropped because of the inherent inconsistency with §§ 906 and 908.[12]

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[11] While "[t]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," United States v. Price, 361 U.S. 304, 313 (1960), the remarks of Congressman O'Hara are not relating a personal post-passage interpretation of a statute, but are describing mechanical events which occurred during the drafting of the House version of Title IX, a description which is confirmed by the committee minutes which were prepared at the time of the events referred to by Congressman O'Hara. See Minutes of the House Comm. on Education and Labor, at 9 (Sept. 30, 1971), cited at Kuhn, supra, 65 Geo. L.J. at 57, n.44.

[12] The Second Circuit in its opinion also argued that Congress "could easily have

Hence, there is no basis for concluding that the deletion of "§ 904" affected the established meaning of the language used in § 901.[13]

footnote 12 continued

drafted an employment exclusion applicable solely to the first portion of the Act." 629 F.2d at 783. This is obviously circular reasoning, as it assumes that an exclusion was necessary to avoid coverage of employment by § 901. The legislative history of Title VI and the plain meaning of the § 601 language as clarified by the § 901 exceptions and the separate provisions covering employment, make clear that this § 601 language was not intended to cover employment and hence no § 604 equivalent was needed.

Moreover, unlike § 601, § 901 is limited to education programs. It would not cover employment programs. See Simpson v. Reynolds Metals Company, Inc., supra, 629 F.2d at 1236, n.18. The "§ 904" language would have excluded coverage of employment except "where a primary objective of the federal financial assistance is to provide employment." Arguably, then, this § 904 language might have extended § 901 to cover such employment programs and hence was better omitted.

[13]The cases dealing with a claimed right of action for handicapped employment

footnote 13 continued

discrimination under § 504 also support the proposition that, without regard to the § 604 language, § 601 is not directed at employment. The § 604 language is incorporated by reference by § 504, relating to handicapped discrimination. Section 604, on its face applies only to "department or agency" action and hence it was argued in the handicapped discrimination cases that, due to the inapplicability to private suits of this § 604 exclusion of employment coverage, private handicapped employment suits are authorized. In Carmi v. Metropolitan St. Louis Sewer District, supra, 620 F.2d at 674, the court rejected this argument, concluding that "Congress did not intend to extend protection under Title VI to any person other than an intended beneficiary of federal financial assistance." See also Carmi, supra, 620 F.2d at 674-675, n.4, citing extensive legislative history to this effect and citing Jefferson County for the proposition that § 604 was merely intended to "make . . . clear" the intended coverage of Title VI. See also a similar discussion of the legislative history of Title VI in Simpson v. Reynolds Metals Company, Inc. supra, 629 F.2d at 1236, n.18.

3. In enacting Title IX, Congress rejected efforts to change § 901 to include coverage for general employment discrimination and instead covered beneficiaries under § 901 and employees under §§ 906 and 908 amending Title VII and the Equal Pay Act.

Other strong evidence supporting petitioners' contention that § 901 was not intended to cover employment by inference is the congressional failure to adopt the Justice Department proposal to do so expressly.

Title IX grew out of hearings held by the House of Representatives in 1970. See Cannon, supra, 441 U.S. at 694, n.16. At that time, representatives of the Justice Department opposed the present language of § 901 and proposed alternative language which the Department said "would extend not only to discrimination against students and other beneficiaries of the Federal Grants, but

also to employment discrimination." Discrimination Against Women: Hearings Before the Special Subcomm. on Education of the Committee on Education and Labor, 91st Cong., 2d Sess., Part 2 (1970) at 678 (hereinafter "Discrimination Hearings").

This proposal would have placed jurisdiction over employment discrimination by educational institutions under HEW rather than under the existing EEOC and Labor Department mechanisms, as was the case under Title IX as ultimately enacted. The Department's proposal included language virtually identical to that which became § 901(a), as well as a separate paragraph (b) which prohibited employment discrimination by an educational institution as follows:

> Sec. 2. (a) No person in the United States shall, on the ground of sex, be

excluded from participation in, denied the benefits of, or subjected to discrimination under, any education program or activity receiving Federal financial assistance, except where sex is a bona fide ground for differential treatment.

(b) No recipient of Federal financial assistance for an education program or activity shall, because of an individual's sex,

(1) fail or refuse to hire (except in instances where sex is a bona fide occupational qualification) or discharge that individual, or otherwise discriminate against him or her with respect to compensation, terms, conditions, or privileges of employment; or

(2) limit, segregate, or classify

> employees in any way which would deprive or tend to deprive that individual of employment opportunities or otherwise adversely affect his or her status as an employee.

Discrimination Hearings, supra, at 690-691 (emphasis added). This proposal reflected the Justice Department's consistent interpretation of the language in § 601 of Title VI and § 901 of Title IX as not including coverage of employment. Hence, if employment was to be covered, there existed a need for an additional subsection (b).

However, there was little support voiced for the Justice Department proposal, which would have put employment under HEW by including it in what became § 901. Instead the witnesses testifying on the subject of employment

discrimination did so with reference to the provisions amending Title VII and the Equal Pay Act. See Discrimination Hearings, supra, at 8-9, 26-27, 79, 128, 159, 379, 453. Moreover, the statement of Bernice Sandler, later a strong advocate of HEW's effort to regulate sex discrimination in employment, discussed only the proposed amendments to Title VII and the Equal Pay Act in relation to ending discrimination against female faculty members, while she confined her comments in regard to the proposal to amend Title VI to matters involving discrimination against students. Id. at 304-306.

Hence, the Justice Department proposal was abandoned and, reflecting the comments of other witnesses, §§ 906 and 908 accomplished the objective of these proposals by amending Title VII to remove the exemption for educational

institutions and amending the Equal Pay Act.[14]

4. Senator Bayh's floor remarks support petitioners' position that § 901 was intended only to cover beneficiaries.

Also confirming this analysis are the floor remarks of Senator Bayh which, taken as a whole, support the proposition that what became § 901 was to be construed in the same way as § 601, that only beneficiaries of federal aid are covered by § 901 and that employment is covered by the amendments to Title VII and the Equal Pay Act.

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[14]Senator McGovern also offered a version of what became § 901, which expressly covered employment, but which was not adopted. This provided that:

> no person in the United States shall be excluded on the grounds of sex from participation in, be denied the benefits

For example, on August 5, 1971, Senator Bayh introduced an amendment to a pending higher education bill. After a general opening statement, Senator Bayh set forth a specific description of § 601 of his proposal (the predecessor of § 901). In this description he said nothing about employment--instead he stated that "Section 601 expressly prohibits discrimination on account of sex--including the denial of admission or benefits." Further, as noted in Cannon, supra, 441 U.S. at 694, n.16, he stated that "[t]hese provisions are identical to

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footnote 14 continued

> of, be subjected to discrimination under or be denied employment in connection with any program or activity assisted under this Act.

117 Cong. Rec. 30411 (1971) (emphasis added).

those provided under Title VI of the 1964 Civil Rights Act." 117 Cong. Rec. 30156 (1971) (emphasis added).

This point was emphasized again in remarks made by Senator Bayh, which also were cited in part by this Court in Cannon, supra, 441 U.S. at 694, n.16.

> I might point out that, so far as involvement or supervision by the Secretary of HEW is concerned, we really are not doing anything to the private school that is not now in the law under title VI of the 1964 civil rights Act, relating to discrimination in other areas.
>
> We are saying that the power which now resides in the Federal Government over private institutions shall be extended. We are

> only adding the 3-letter word "sex" to existing law.

117 Cong. Rec. 30408 (1971) (emphasis added).

Similarly, Senator Bayh's remarks of February 28, 1972, when he reintroduced his amendment, indicate a decision to leave jurisdiction over employment discrimination to the EEOC and the Labor Department rather than give jurisdiction to yet another federal bureaucracy in HEW to regulate employment discrimination. Specifically, Senator Bayh labeled the first portion of his floor statement "A. Prohibition of Sex Discrimination in Federally Funded Education Programs." He explained that:

> Discrimination against the beneficiaries of federally assisted programs and activities is already prohibited by title

> VI of the 1964 Civil Rights Act, but unfortunately the prohibition does not apply to discrimination on the basis of sex. In order to close this loophole, my amendment sets forth prohibition and enforcement provisions which generally parallel the provisions of title VI.

118 Cong. Rec. 5807 (1972) (emphasis added).

Then, in a separate section of this statement, Senator Bayh discussed changes in Title VII and the Equal Pay Act under the heading "B. Prohibition of Education-Related Employment Discrimination."

A similar breakdown exists in the relevant section of the House Report, H. Rep. No. 554, 92d Cong. 1st Sess. (1971), reprinted in [1972] U.S. Code Cong. & Ad. News 2462, 2511-12, again

indicating a recognition that employment discrimination is dealt with separately. The Report first discusses the problems: in the first paragraph, problems in admissions, and in the second paragraph, problems "at the faculty level." The Report then goes on, in parallel fashion, to discuss the solutions: the third paragraph discusses the prohibition of "discrimination in any education program or activity" and its application to the admissions problem. Then, noting that "[t]he title also contains provisions to deal with discrimination in related areas," e.g., employment, the Report discusses the amendments to Title VII and the Equal Pay Act in the remaining paragraphs.

As the First Circuit Court of Appeals noted in Islesboro II in reference to Senator Bayh's statement:

> This breakdown demonstrates that the basic provisions dealing with admissions and services at educational institutions, now embodied in Title IX, were separate and distinct from the provisions amending Title VII and the Equal Pay Act, both of which dealt with employment.

593 F.2d at 428.

Despite this clear indication from Sen. Bayh that § 901 covered beneficiaries, that it is "identical to" § 601 of Title VI and that employment is covered under other provisions, HEW has focused its attention on a few selected and imprecise floor statements of Sen. Bayh, lifted out of context, and has proceeded to use these statements as a basic underpinning of its arguments.

For example, in connection with Sen. Bayh's floor statement containing the breakdown just referred to, the appeals court, adopting HEW's arguments, ignored the hundreds of words in Subsection A which were directed at problems relating to discrimination against students. Instead, it focused on the six words which mentioned employment, where Senator Bayh stated that "this portion" of his amendment [§ 1001-1005] covered, inter alia, "employment practices for faculty and administrators."

In addition to the anomaly that employment is not otherwise mentioned in Senator Bayh's long discussion in section A of his statement, his brief remarks concerning employment do not support HEW's position, because, as even the Second Circuit admitted, "[t]here is some

discrepancy" in the statement of Senator Bayh for which Senator Bayh was guilty of an "oversight." 629 F.2d at 781, n.11. This is because Subsection A of Senator Bayh's remarks starts with the statement that "[c]entral to my amendment are sections 1001-1005" and § 1005 was the proposal to amend Title VII. Hence, the statement that "this portion" of Senator Bayh's amendment covered some employment does not necessarily mean that § 1001, the predecessor of § 901, covers employment. Rather, if not itself an "oversight," this statement reflects the fact that § 1005 amended Title VII and therefore it, rather than § 1001, covered employment. This statement also could refer to possible limited coverage

under § 901 of employment actions affecting beneficiaries of federal education aid.[15]

Suprisingly, this statement in the midst of "discrepancy" and "oversight" is regarded by HEW as the "clearest expression of the intent of the amendment . . . . "Petition for a Writ of Certiorari United States Department of Education v. Seattle University, No. 80-493, p. 16. In view of this, it is not surprising that the other comments by Senator Bayh relied on by the Second Circuit Court of Appeals, 629 F.2d at 779-782, are even more elliptical. They also are taken out

[15] Immediately after the sentence containing the six words referring to employment, Senator Bayh refers to how the provisions "have been tested under title VI of the 1964 Civil Rights Act," which admittedly did not cover general employment practices. 118 Cong. Rec. 5807 (1972).

of context, and reflect imprecision on Sen. Bayh's part, and would not appear to be inconsistent with his frequent emphasis that § 901 of Title IX is identical to Title VI and that employment is covered by amendments to Title VII and the Equal Pay Act.[16]

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[16] For example, at 118 Cong. Rec. 5803 (1972), in close proximity to an earlier remark describing § 901 as the "heart of this amendment", Senator Bayh states that the "amendment" covers, inter alia, " . . . faculty employment, with limited exceptions." Due to the sequence and proximity of these remarks, HEW asserts that the reference to "faculty" must be in relation to § 901. Yet, the use of the word "amendment" - which Bayh used elsewhere to describe the whole of Title IX (i.e. "Amendment 874") - makes it questionable to ascribe the "faculty" coverage remark to any particular section of Title IX, and is in no way inconsistent with the position that the "faculty" were covered by Title VII and the Equal Pay Act.

Later, at 118 Cong. Rec. 5812-5813 (1972), Senator Bayh answers several of

footnote 16 continued

Senator Pell's questions concerning Title IX's coverage. This colloquy commences with questions by Senator Pell about the exceptions to § 901's coverage of admissions, which Senator Bayh answers in one sentence, followed by a generalized discussion of the types of discrimination covered by Title IX. Thus, Senator Bayh was clearly not confining his answers to the topics of Senator Pell's questions.

HEW nevertheless argues that Senator Bayh's later references to the military and parochial school exemptions in response to Senator Pell's questions about quotas and female teachers at such schools clearly imply an understanding that the exceptions to § 901 relate at least in part to employment. HEW attempts to use that exchange as support for its conclusion that § 901 itself covers employment. See 118 Cong. Rec. 5812, 5813 (1972).

While, as noted earlier, Senator Bayh's answers do not merely respond to Senator Pell's questions, but digress, if Senator Bayh's remarks were as precise as HEW contends, then they would contradict each other, since Senator Bayh stated flatly near the beginning of the colloquy that "[i]n the area of employment, we permit no exceptions." 118 Cong. Rec. 5812 (1972), while also stating that there are exemptions for teachers in certain situations.

Hence, as the First Circuit Court of Appeals stated:

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footnote 16 continued

> The Islesboro II court and other courts have examined this passage and accurately termed the remarks upon which HEW relies "the product of the imprecision of oral discussion." 593 F.2d at 428.
>
> An illustration of the out of context problem is the Second Circuit's reliance on two passing references to employment in Senator Bayh's introductory remarks of February 5, 1971, which Senator Bayh made in the context of a statement that "[t]he antidiscrimination provisions of the Civil Rights Act of 1964 do not deal with sex discrimination by our institutions of higher learning", 117 Cong. Rec. 30157 (1971). Though relying on this passage, the court does not refer to Senator Bayh's specific description of § 601, quoted above, as dealing with beneficiaries, does not refer to the fact that this broad focus tied in to a task force report which Senator Bayh inserted into the Congressional Record at that time, 117 Cong. Rec. 30157-30158 (1971), and does not refer to the fact that he went out of his way at that time to say that his proposal was identical to Title VI. 117 Cong. Rec. 30156 (1971).

> While it is true that there were occasional lapses during the discussions, wherein one of the senators would telescope the sections, thereby suggesting that employment was to be covered under the basic provisions of Title IX, a careful examination of the debates has led us to conclude that these were the product of the imprecision of oral discussion rather than a reflection that the Act intended section 901 of Title IX to embrace prohibitions against sex discrimination in employment. This was reserved for the amended Title VII and the Equal Pay Act.

Islesboro II, supra, 593 F.2d at 428 (emphasis added).

At the very least, it was totally unjustified for the court to overlook the numerous statements of Senator Bayh that § 901 was "identical"

to § 601 and then give substantial weight to selected portions of Senator Bayh's remarks on the Senate floor, which refer ambiguously to employment coverage, and for the court to assume that any such coverage was broader than under Title VI. As this Court has recently stated, "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." Chrysler Corp. v. Brown, 441 U.S. 281, 311 (1979); accord, Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 118 (1980).[17] This is especially so here where so many other courts have read

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[17] The Second Circuit Court of Appeals also cited the legislative "history" after the passage of Title IX, noting that Congress did not disapprove the regulations and that later attempts to limit the scope of Section 901 had failed. Under 20 U.S.C. § 1232, Congress has only forty-five days to reject regulations; therefore, all that it took to prevent disapproval of the Title IX regulations, which were being

footnote 17 continued

attacked in toto, was a series of procedural maneuvers which prevented a timely floor vote in either house. See Comment: "HEW's Regulations Under Title IX of the Education Amendment of 1972: Ultra Vires Challenge", 1976 Brigham Young U. L. Rev. 133, at 156 (1976) (hereinafter "Ultra Vires"). Little if any weight can be given such history. "Congressional inaction frequently betokens unawareness, preoccupation or paralysis." Zuber v. Allen, 396 U.S. 168, 185, n.21 (1969). Further, as this Court has stated in United States v. Price, 361 U.S. 304, 313 (1960): "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." Accord, International Brotherhood of Teamsters v. United States, 431 U.S. 324, 354, n.39 (1977); County of Washington v. Gunther, 49 U.S.L.W. 4623, 4627, n.16 (1981). This is especially true when there is a mere failure to act. Because of this, in 1975, just after it failed to disapprove these regulations, Congress enacted legislation to ensure that courts would not draw an inference from Congress's failure to disapprove regulations. 20 U.S.C. § 1232(d)(1). This bill was pending before Congress at the same time as the Title IX regulations were before Congress. The Second Circuit, ignoring this instruction, proceeded to do so anyway.

these ambiguous remarks in a contrary manner.[18]

It is also significant that nowhere prior to enactment is there any statement by a legislator expressly contrasting § 901 of Title IX with § 601 of Title VI, indicating that Title IX covers employment and Title VI does not.

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[18] In rendering its opinion, the Second Circuit stated that it was "cognizant that four other courts of appeals and a number of district courts have held otherwise," 629 F.2d at 774, that "we are well aware of Justice Jackson's warning against selecting casual statements from floor debates, Schwegmann Brothers v. Calvert Distillers Corp., 341 U.S. 384, 395-96 (1951) (Jackson, J., concurring)," 629 F.2d at 781 and that "Congressional inaction should not lightly be construed as approval," 629 F.2d at 784. Yet it proceeded to render an opinion contrary to the seventeen other decisions which had dealt with this question, based on the statements of Senator Bayh which HEW had taken out of context from his floor remarks and based on post-enactment inaction.

To the contrary, there was an express proposal by the Justice Department to cover employment under § 601. This approach, however, was not adopted. Congress chose instead to give jurisdiction over sex discrimination in employment to the existing EEOC and Labor Department mechanisms rather than to HEW.

Thus, the legislative history taken as a whole is clear that § 901 was intended to parallel § 601 and protect beneficiaries of federally funded programs, not employees of an educational institution.

B. The Subpart E Regulations Are Not Directed to Employment Discrimination Affecting Beneficiaries; Thus the Issue of Whether Certain Employment Practices Can Be Regulated on a Systemic Basis Where Such Practices Cause Sex Discrimination Against Students Is Not Before the Court.

HEW has argued that Subpart E

can be justified based on an "infection" theory found in some Title VI and fourteenth amendment racial desegregation cases, e.g., United States v. Jefferson County Board of Education, supra, 372 F.2d 836, which permitted desegregation orders regarding students to include provisions respecting the allocation of faculty. HEW has argued that the basis of these decisions is the recognition of the effect upon students of discrimination against faculty, which effect applies, it is contended, in cases of sex discrimination as well as cases of race discrimination.

Clearly, however, this argument is totally irrelevant here. HEW has not promulgated or proceeded under "infection" regulations. Rather, it has

promulgated Subpart E's broad-ranging regulations covering the entire field of employment-related sex discrimination, totally without regard to any effect on students. In contrast, HEW's regulations under Title VI, dealing with employment discrimination against non-beneficiaries of federal aid, at least contain a section explicitly setting forth a requirement of a nexus between the effect of employment practices on employees and the alleged "infection" of students. (See 45 C.F.R. Part 80.3(c)(3).)

As the Court noted in Islesboro II, supra, 593 F.2d at 430:

> While the basic premise [of the infection theory] might be correct, it does not adequately underpin a grant of authority to HEW to promulgate broad-ranging regulations

> canvassing employment-related discrimination.

Accord, Junior College II, 597 F.2d at 121, n.3; Romeo I, supra, 438 F. Supp. at 1035; Seattle University, supra, 621 F.2d at 994. See also University of Toledo, supra, 464 F. Supp. at 696.

Thus, the issue of whether infection regulations under Title IX might be valid if promulgated is irrelevant to this case.[19]

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[19] Although irrelevant here, there is a serious question as to the appropriateness of the "infection" theory in a Title IX individual discrimination context. HEW's infection cases involved racial desegregation remedies under Title VI and the Constitution, where provisions regarding faculty were necessary to accomplish an end to systemic racial discrimination against students. These cases do not support the use of Title VI as another Title VII type remedy for an individual case of employment discrimination. To the contrary, United States v. Jefferson County Board of Education, supra, 372 F.2d at 883, expressly states that

footnote 19 continued

"Congress did not, of course, intend to provide a forum for the relief of individual teachers who might be discriminatorily discharged. . . ."

Moreover, the one Title IX case cited in support of application of the infection theory to justify the instant regulations, Caulfield v. New York City Board of Education, 486 F. Supp. 862, 882-83 (E.D.N.Y. 1979), aff'd. 632 F.2d 999 (2d Cir. 1980), cert. denied, 101 S. Ct. 1739 (1981) actually supports petitioners' position. District Judge Weinstein (E.D.N.Y.) in Caulfield indicated agreement with the holdings of Romeo I and its progeny on the invalidity of Subpart E and proceedings under it. Id. at 882-883. While the court did not "suggest that the possible effect of sexually discriminatory school employment practices on students is as clear or severe as that of racially discriminatory practices," the court indicated that there was sufficient colorable basis for such claim of "infection" in some limited Title IX situations involving "systemic discrimination," so as to justify a voluntary settlement with the Department of Education by the New York City Board of Education. Id. at 885. Note also that the various infection cases cited in Caulfield, 486 F. Supp. at 880-881, all relate to systemic discrimination. Hence, as the court pointed out in Sabol v. Board of Education, 510

II. THE SUBPART E REGULATIONS ARE INVALID BECAUSE THEY ARE NOT PROGRAM SPECIFIC.

The Subpart E regulations are also invalid because they ignore the

footnote 19 continued

F. Supp. 892, 899 (D.N.J. 1980); citing Caulfield and Jefferson County:

> These cases clearly indicate that teacher discrimination is equivalent to discrimination against students only where broad policies of hiring and assignment are involved, not where a solitary case of employment discrimination occurs.

Similarly, it has been argued that there are a few limited circumstances where an employee is the primary beneficiary of a federal program who would be covered by Title IX, but, again, Subpart E is not directed at any such limited categories. Furthermore, § 901, unlike § 601, is applicable only to an "education program or activity". Section 901 would therefore appear to be inapplicable to programs designed to provide employment. See Simpson v. Reynolds Metals Company, Inc., supra, 629 F.2d at 1236, n.18.

restrictions in §§ 901-902. Section 901 pertains only to discrimination in an "educational program or activity receiving Federal financial assistance." Section 902 limits HEW's power under § 901 to the "particular program, or part thereof" in which discrimination is found, and also require that the regulations be directed to the federally funded programs.

The challenged regulations ignore these restrictions as they purport to regulate general employment practices in all programs "operated by a recipient which receives or benefits from Federal financial assistance" (see 34 C.F.R. § 106.51(a)), and in no way limit the scope of their coverage to discrimination in federally funded programs.

A. The Program Specific Language of § 901, Similar to the Program Specific Language of § 601, Limits HEW's Jurisdiction to Those Programs Which Receive Federal Financial Assistance.

The language of § 901 prohibits discrimination in "any education program or activity receiving Federal financial assistance." This prohibition, commonly characterized as "program specific," is quite different from, and is a severe restriction of, the original Senate version of Title IX which would have covered discrimination not on a program specific basis but on an institution wide basis, i.e., over the entire spectrum of education programs at an institution with no narrow limitations to the program actually receiving federal money.

The early version provided that:

> No person in the United States shall, on the ground of sex, be excluded from participation in, be denied the benefits of or be subject to discrimination under any program or activity conducted by a public institution . . . which is a recipient of Federal financial assistance for any education program or activity . . .

117 Cong. Rec. 30156 (1971) (emphasis added).

Thus, this original version provided that a school district that discriminated in any program or activity could lose all federal funds regardless of whether federal assistance was involved in the offending program.

However, the version of the bill ultimately adopted by Congress limits fund termination to the particular

program receiving federal financial assistance. If boys are illegally denied access to a home economics program receiving federal assistance, funds can only be terminated to that program and not, for example, to a federally funded vocational training or special education program.

In contrast, § 604 of Title IX, as enacted, 20 U.S.C. § 1684, relating to discrimination against blind people, adopted this "institutional," non-program specific approach.[20] Hence, there

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[20] Section 904 of Title IX provides that "[n]o person in the United States shall, on the grounds of blindness or impaired vision, be denied admission in any course of study by a recipient of Federal financial assistance for any education program or activity." (emphasis added) Section 904 of Title IX as enacted is not to be confused with the proposed § 904 which would have excluded employment using language similar to § 604 of Title VI.

can be no doubt that "Congress was aware of the distinction between the concept of an institutional approach" and the concept of a "programmatic approach." See, Othen v. Ann Arbor School Board, 507 F. Supp. 1376, 1382 (E.D. Mich. 1981).

In light of all of this, it is clear that the words "program or activity" appearing in § 901 do not mean "institution" or "school district."

Title VI's program specific limitations were aptly described by the Fifth Circuit Court of Appeals in Board of Public Instruction of Taylor County, Florida v. Finch, 414 F.2d 1068, 1078 (5th Cir. 1969), when it said:

> Congress did not intend that such a program suffer for the sins of others. HEW was denied the right to condemn programs by association. The statute

> prescribes a policy of disassociation of programs in the fact finding process. (emphasis added)

Thus, Title IX prohibits discrimination in any federally funded education program or activity. It does not cover the portion of petitioners' education programs and activities which do not receive federal assistance. By attempting to subject all programs of an institution, whether federally funded or not, educational or not, to HEW regulations if any one program receives federal financial assistance, the regulations improperly exceed the authorizing statute. See Ultra Vires, supra, 1976 Brigham Young U. L. Rev. at 152.

B. Section 902, the "Pinpoint" Termination Provision, Confirms the Program Specific Scope of Section 901.

The first Bayh version of Title IX contained compliance language virtually identical to what was ultimately enacted. However, it did not contain the "pinpoint" termination provision, found in § 902 of Title IX and § 602 of Title VI, which limits any termination of federal assistance to the "particular program, or part thereof," in which discrimination is found.

The genesis of Title IX's pinpoint termination provision is found in the legislative history of the identical provision contained in Title VI. As the 1964 Civil Rights Act worked its way through the House and Senate, prior to the insertion of the pinpoint language, the question frequently arose as to whether assistance to one program

could be cut off because of a finding of discrimination in another program. The consistent answer was "no." See, e.g., Civil Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary, ser. 4, pt. II, at 1542-1543, 88th Cong., 1st Sess. (1963) (colloquy between Rep. Meader and HEW Secretary Celebrezze that the withholding of funds from one program cannot be used as a means of combatting discrimination in another program).

The Justice Department agreed that aid would be cut off "just from the particular program where the discrimination exists." Civil Rights: Hearings Before the House Comm. on the Judiciary, ser. 4, pt. IV, at 2766, 88th Cong., 1st Sess. (1963). The Attorney General further indicated that not only must

the termination of assistance be limited to the particular program where the discrimination is found, it must also be limited to the particular location, i.e., the school or schools within a district, where the discrimination exists. Id. During floor debate, Representative Mathias called his colleagues' attention to the Attorney General's assurance that any termination of assistance would be "as specific and particular as it possibly could be" and he noted that "this was certainly the understanding of the members of the committee in working on the bill." 110 Cong. Rec. 2486 (1964).

The Senate floor leader for Title VI emphasized that "participation in one program would not justify the exaction of a non-discrimination assurance concerning some other program." 110

Cong. Rec. 7059 (1964) (remarks of Senator Pastore). Senator Ribicoff, one of the two authors of the version of Title VI passed by the House, pointed out that discrimination in one program would not justify any action with respect to any other program. Id.

The repeated assurances by the civil rights leadership that assistance to one program could not be terminated because of a finding of discrimination in another program were made prior to the inclusion in Title VI of the so-called "pinpoint" termination provision. When the final version of the Civil Rights Act was proposed, the new Title VI included the pinpoint provision. It was pointed out on the floor of the Senate that:

> The new language will ensure that Federal funds will be cut off

> for only those political entities or particular programs or parts of programs in which discrimination is practiced.

110 Cong. Rec. 12689 (1964) (remarks of Senator Saltonstall). The floor leader for the Civil Rights Act also explained to his colleagues that the revisions clarified the intent that any "[t]ermination shall affect only the particular program, or part thereof," in which a violation occurs. 110 Cong. Rec. 12715 (1964) (remarks of Senator Humphrey).

When House Judiciary Committee Chairman Celler appeared before the House Rules Committee to describe the Senate amendments to the bill, he said:

> [T]he Senate amendment makes clear that Federal funds will be cut off for only those political

> entities or particular programs or parts of programs in which discrimination is practiced. This means that all . . . aid to a particular program, will not be cut off because one particular part of the program or institution is being operated in violation of the law.

Civil Rights: Hearing Before the House Comm. on Rules, 88th Cong., 2d Sess. at 6 (1964) (emphasis added).

The legislative history reinforces, therefore, what the very language of the statute itself makes clear: federal assistance to program "A" cannot be terminated because of a finding of discrimination in program "B." Thus, it is unlikely in the extreme that Congress intended by § 901 to protect all of plaintiff's employees in every program, when the remedies provided by § 902 are

limited to the one or more federally assisted programs in which discrimination is shown to exist. Under HEW's Title IX regulations, a school district which discriminates in any employment practice, in any program, whether federal assistance is involved or not, could lose all federal aid.

C. Section 902 Expressly Limits Rule Making Authority To Federally Funded Programs.

In addition to the pinpoint termination language, a second part of § 902 specifically requires that regulations under Title IX be limited to federally funded programs.

In its decision, the Second Circuit overlooked this provision, stating that:

> [w]e disagree with the court below and the district court

> in Romeo Community Schools, supra, 438 F. Supp. at 1033, that this limitation [on the right to terminate funds] 'is implicitly a limitation on HEW's authority to regulate as well.' Such a construction is contrary to the judicial approval given to broad HEW guidelines under Title VI of the Civil Rights Act of 1964, which also contains this language limiting fund termination. See United States v. Jefferson County Board of Education, 372 F.2d 836, 847-61 (5th Cir. 1966), adopted en banc per curiam, 380 F.2d 385, cert. denied, 389 U.S. 840 (1967).

629 F.2d at 785.

However, this reliance on the Fifth Circuit was clearly misplaced, as is indicated by the decision of the Fifth Circuit Court of Appeals in Dougherty II,

handed down a few days after the Second Circuit decision.

As the Dougherty II decision explained, there is in fact a specific requirement in § 902 that HEW's regulations be directed to programs and activities:

> Section 1682 states that a department is authorized "to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." 20 U.S.C. § 1682 (emphasis added). Further evidence that the regulations must be keyed to a specific

> program is found in the enforcement provisions. Section 1682 states that termination or refusal of federal funds "shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found." 20 U.S.C. § 1682 (emphasis added).

Dougherty II, supra, 622 F.2d at 737 (emphasis in original). Thus, the opinion in Dougherty II shows that the Second Circuit erred when it relied on the earlier opinion of the Fifth Circuit in Jefferson County and said that there was "[n]othing in § 902 [which] requires HEW only to issue regulations directed at specific programs." 629 F.2d at 785. See also Board of Public Instruction of Taylor County, Florida v. Finch, supra, 414 F.2d 1068 (5th Cir. 1969)

(Title VI of the Civil Rights Act must be administered on a program-by-program basis); Ultra Vires, supra, 1976 Brigham Young U. L. Rev. at 179.

Further, the Second Circuit overlooked the fact that § 901 itself is limited to discrimination in an "education program or activity receiving Federal financial assistance" and that Senator Bayh's broader proposal which would have covered all programs of institutions receiving federal funds was not adopted.

Hence, as the Court said in Dougherty II, supra, "the Secretary exceeded his authority by enacting general regulations prohibiting sex discrimination in employment without limiting their effect to specific programs that received

federal financial assistance." 622 F.2d at 738.

III. THE FEDERAL GOVERNMENT AND INDIVIDUAL EMPLOYEES HAVE OTHER MEANS TO REMEDY EMPLOYMENT DISCRIMINATION BY EDUCATIONAL INSTITUTIONS.

Title VII and the Equal Pay Act serve to make employees who have been discriminated against on the basis of sex "whole" for any discrimination they might have suffered. There is no need for yet another government agency to have jurisdiction over employment discrimination.

In extending the jurisdiction of the EEOC and the Secretary of Labor to cover employment discrimination in educational institutions on the basis of sex, rather than giving that jurisdiction to HEW, Congress recognized the expertise of these agencies in this area. As the

court stated in Romeo I, supra, 438 F. Supp. at 1034:

> These governmental agencies, particularly the EEOC, were established specifically for the purpose of regulating discrimination in employment practices. These agencies have the expertise and their enabling legislation has provided them with the investigative and enforcement machinery necessary to compel compliance with regulations against sex discrimination in employment. HEW does not have similar enforcement authority.

The Second Circuit Court of Appeals disagreed and described the remedies under Title VII and the Equal Pay Act as "piecemeal." 629 F.2d at 785.

This is clearly inaccurate, as is established by the number of large

class action settlements achieved pursuant to these acts. The Equal Employment Opportunity Commission, under Title VII, and the Department of Labor, under the Equal Pay Act, have been able to reach large class action settlements with employers who have been found to discriminate.[21]

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[21] The Equal Employment Opportunity Commission has brought suit against numerous companies, including AT&T, General Electric and Bank of America, and has won large settlement agreements with these companies providing many millions of dollars to women in back pay and for educational programs (FEP Manual 431:53-124o).

More recently, Ford Motor Company and the EEOC agreed to a twenty-three million dollar conciliation agreement in settlement of claims of employment discrimination. That agreement provided for cash settlements of thirteen million dollars to approximately fourteen thousand women and minorities. Ten million dollars more will be used for training and affirmative action efforts. (See Daily Labor Report, No. 229, November 25, 1980, p. 1)

The remedies available to victims of sex discrimination under Title VII and the Equal Pay Act are not "piecemeal," but serve to make not only one employee, but a large group of employees, whole for any discrimination they may have suffered. These remedies would include back pay, reinstatement, promotion and remedies specifically directed towards the employment environment. Thus, rather than depriving schoolchildren of a remedial reading program when someone in the central office administrative staff has been discriminated against, those

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footnote 21 continued

Similarly, the EEOC recently entered into a consent decree with the Las Vegas casino industry to enable women to enter higher paying positions. That decree established a one million dollar fund for monetary awards to women. (See Daily Labor Report, No. 9, January 14, 1981, p. A22-23.)

remedies serve to make the employee in question whole while not destroying a program established for the benefit of schoolchildren. As the district court noted in North Haven, supra, 19 FEP Cases at 1508: "[t]he termination weapon would be ineffective against sex discrimination in employment . . . ."[22]

In fact, the anomaly is such that in struggling to make sense out of HEW's authority under Title IX, the

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[22]The possible ludicrous result of HEW's position can be seen in the Junior College District case, wherein the original charge of wage discrimination had been filed by an administrative employee, the Assistant Dean for Financial Aid and Placement, and HEW threatened to terminate federal financial assistance. Similarly, the Brunswick and Islesboro school boards were threatened with a cutoff of funds because of their maternity disability policies. It is highly improbable that either situation could infect the classroom environment with sex discrimination.

Department of Justice and the Equal Employment Opportunity Commission have recently proposed regulations under Title IX under which "most complaints of individuals of discrimination [under Title IX] will be referred to EEOC," see 46 Fed. Reg. 22,395 (April 17, 1981), and the Department of Education has announced that it is reviewing some, if not all of, the Subpart E regulations. (See letter dated June 23, 1981 authored by the Solicitor General, Mr. Wade McCree, on behalf of the Department of Education, which was sent to the Clerk of this Court to be filed herein. That letter specifies that the Department of Education is reviewing the Title IX regulations.)

The federal government and individuals already have adequate means

to remedy employment discrimination. A holding that § 901 does not prohibit employment discrimination will not sanction such discrimination. Rather, employment discrimination will be remedied by resort to Title VII; the Equal Pay Act; the post-Civil War civil rights statute, 42 U.S.C. § 1983; the Office of Federal Contract Compliance Programs and various state and local discrimination agencies.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Second Circuit Court of Appeals and reinstate the judgments of the district court.

Respectfully submitted,

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NORTH HAVEN BOARD OF
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